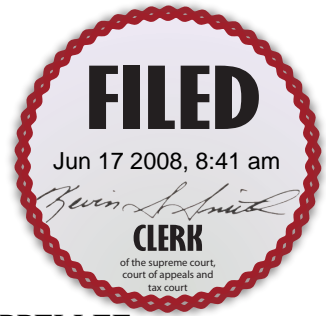


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER DECKER,

Appellant-Respondent,

vs.

STATE OF INDIANA,

Appellee-Petitioner.

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No. 26A01-0712-PC-537

APPEAL FROM THE GIBSON SUPERIOR COURT
The Honorable Earl G. Penrod, Judge
Cause No. 26D01-0706-PC-2

June 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Christopher Decker appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, he contends that the post-conviction court erroneously determined that his guilty plea was voluntary. Because the evidence shows that Decker's trial counsel did not promise him that his record would later be expunged if he pled guilty to two counts of Class D felony child solicitation, we affirm the post-conviction court.

Facts and Procedural History

On July 30, 1996, the State charged Decker with Class C felony child molesting and Class D felony child solicitation under Cause No. 26D01-9607-CF-7. That same day, the State charged Decker with the same offenses involving a different victim under Cause No. 26D01-9607-CF-8. Decker was represented by Attorney John Hicks. On January 22, 1997, Decker pled guilty to both child solicitation charges, and the State agreed to dismiss both child molesting charges and to an eighteen-month sentence to be served on work release and probation. Before accepting the guilty plea, the trial court advised Decker of the various rights he was waiving and the penalties for the crimes to which he was pleading guilty. The court told Decker that although it could enter judgments of conviction for Class A misdemeanors, it was not going to do so. Finally, the court advised Decker, "The Court cannot accept a plea of guilty unless it's voluntarily made. So I'll ask you at this time sir, have there been any threats made or any force used or *any promises made to get you to plead guilty?*" Pet.'s Ex. 1, p. 9 (emphasis added). Decker responded, "No." *Id.* The trial court then accepted Decker's guilty plea and

sentenced him to eighteen months, the first six months to be served on work release and the remainder suspended to probation.

Ten years later, on March 22, 2007, Decker, represented by different counsel, filed a petition to modify his sentence, in which he argued that his status as a felon was limiting his employment prospects. As such, Decker asked the court to re-enter his child solicitation convictions as misdemeanors. The trial court denied this motion.

Thereafter, on June 13, 2007, Decker filed a petition for post-conviction relief alleging that his guilty plea to the two counts of Class D felony child solicitation was involuntary because Attorney Hicks “misled and induced him to plea [sic] guilty by assurances that his cases would go away after sentencing or be reduced to a [sic] misdemeanors.” Appellant’s App. p. 9. At the hearing on this petition, Decker testified that Attorney Hicks advised him during the guilty plea negotiations that “we could come back [in two or three years] and get this cleaned up.” Tr. p. 6, 11. Decker stated that Attorney Hicks defined “cleaned up” as “make it disappear” or “go away” “like it never happened.” *Id.* at 11. Attorney Hicks, however, denied advising Decker that “things would go away” and noted that it would have been “impossible” to do so. *Id.* at 14, 18. Attorney Hicks testified that he would have reviewed the plea agreement with Decker, explained the risks of rejecting it, and allowed Decker to make the final decision.

On October 24, 2007, the post-conviction court issued Findings of Fact, Conclusions of Law and Order, which provides, in pertinent part:

10. The Court finds Petitioner is not entitled to relief as requested as Petitioner has not demonstrated that his plea of guilty was involuntary.

11. Specifically, Petitioner has alleged but has not proven that his guilty plea was involuntary as a matter of law because of some sort of promise made by defense counsel.

12. The evidence presented shows that at most, Petitioner may have been apprised that he could, subsequent to his guilty plea, petition the Court to modify the sentence by amending the felony convictions to misdemeanor convictions.

13. Petitioner has failed to show that his guilty plea was not voluntary, knowing and intelligent and the Court finds Petitioner's plea was voluntary, knowing and intelligent.

Appellant's App. p. 4. Decker now appeals.

Discussion and Decision

Decker contends that the post-conviction court erred in denying his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)).

Decker argues that the post-conviction court erroneously determined that his guilty plea was voluntary. A defendant's guilty plea must be voluntary, and a trial judge has a duty to ensure that it is so. *Ellis v. State*, 744 N.E.2d 425, 427 (Ind. 2001). Indiana Code § 35-35-1-3(a) provides that the trial court "shall not accept a plea of guilty . . . without first determining that the plea is voluntary. The court shall determine whether any promises, force, or threats were used to obtain the plea." Here, before accepting Decker's plea of guilty, the trial court advised Decker of all the rights he was waiving and the penalties he was facing and explicitly asked him if there had "been any threats made or any force used or *any promises made to get you to plead guilty?*" Pet.'s Ex. 1, p. 9 (emphasis added). Decker responded no. The court then accepted Decker's guilty plea.

At the post-conviction hearing, Decker testified, however, that Attorney Hicks had in fact promised him during the guilty plea negotiations that two or three years down the road he could get his child solicitation convictions expunged from his record and, but for Attorney Hicks' promise, he never would have pled guilty to the child solicitation charges. Attorney Hicks flatly denied making such a promise to Decker. Thus, the post-conviction court was faced with a credibility assessment that it resolved in favor of Attorney Hicks. This is a credibility assessment that we will not second-guess on appeal. *See Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004) ("The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses."). As such, Decker has failed to show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. We therefore affirm the post-conviction court.

Affirmed.

MAY, J., and MATHIAS, J., concur.